

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

HEALTHY FIBER, LLC

Plaintiff,

V.

THE KROGER CO., INC.

Defendant.

CIVIL ACTION NO. 2:17-cv-675
JURY DEMAND

PLAINTIFF'S COMPLAINT

1. Plaintiff Healthy Fiber, LLC (“Plaintiff” or “Healthy Fiber”) files this Complaint asserting claims for patent infringement of U.S. Patent No. 9,668,488 (“the ‘488 Patent”), a copy of which is attached hereto as Exhibit “A” against Defendant The Kroger Co., Inc., (“Defendant” or “Kroger”) under 35 U.S.C. § 271, *et seq.* In support thereof, Healthy Fiber would respectfully show the Court the following:

PARTIES

2. Healthy Fiber is a Florida limited liability company, with its principal place of business located at 545 W 37th Street, Miami Beach, Florida 33140. Healthy Fiber is owned and operated by the two named inventors of the '488 Patent, David and Aryeh Holzer.

3. Kroger is an Ohio corporation with its corporate offices located at 1014 Vine Street, Cincinnati, Ohio 45202. Kroger operates more than 2,700 supermarkets and multi-department stores in 35 states and the District of Columbia. Kroger conducts business in Texas through more than 200 supermarkets, a number of which are located within the Eastern District of Texas. Kroger

may be served through its registered agent for service of process, Corporation Service Company d/b/a CSC-Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

JURISDICTION AND VENUE

4. This is an action for patent infringement arising under the patent laws of the United States, Title 35, United States Code. This Court has exclusive subject matter jurisdiction over this case for patent infringement under 28 U.S.C. §§1331 and 1338(a).

5. This Court has personal jurisdiction over Defendant Kroger. Kroger maintains retail stores and conducts business throughout the State of Texas and the Eastern District of Texas. Kroger, ships, distributes, offers for sale, sells, and advertises its products in the United States, the State of Texas, and the Eastern District of Texas. Kroger has committed the tort of patent infringement within the State of Texas and this District.

6. Venue is proper in the Eastern District of Texas under 28 U.S.C. §1400. Kroger has committed acts of infringement and has a regular and established place of business located in the Eastern District of Texas by virtue of the many stores it owns and operates throughout the District, including stores located at 300 East End Blvd. N., Marshall, Texas, 701 W. Marshall Ave., Longview, Texas, 2415 U.S. Highway 79 S., Henderson, Texas, 1310 Clarksville St., Paris, Texas, 1820 N. Loy Lake Rd., Sherman, Texas, and also multiple stores in Beaumont, Texas and throughout Collin County, Texas.

BACKGROUND

7. Overweight and obesity in the United States have reached epidemic proportions. According to the National Health and Nutrition Examination Survey, 2013-2014, as reported by the National Center for Health Statistics within the U.S. Department of Health and Human

Services, Centers for Disease Control and Prevention, more than 70% of adults in America are overweight or obese, with more than 37% of adults being considered obese. Overweight and obesity are risk factors for many health problems, including heart and cardiovascular disease, type 2 diabetes, high blood pressure, joint problems, gastrointestinal problems, and other diseases and conditions. Generally, the most common ways for adults to lose weight is by reducing the number of calories they consume, by increasing the amount of exercise or physical activity in which they engage, or a combination of both.

8. David Holzer is a businessman and inventor who has received six patents from the United States Patent and Trademark Office covering a variety of technologies. In addition, he has also received patents in other countries, including Canada, United Kingdom, Japan, Australia and Israel. Being concerned about the increase in the number of overweight and obese adults, David Holzer and his son Aryeh Holzer began in 2003 researching methods of producing reduced-calorie grain-based foods, such as breads, pastas, cereals, crackers, and pastries. They believed that alternative versions of these types of foods which contained one-third or one-half the calories of the standard versions could be very useful to consumers who were interested in lowering their calorie consumptions. By providing flavorful products that correspond closely to familiar and popular foods consumers enjoy eating, these products would promote satiety and avoid the feelings of deprivation which can frustrate many dieters.

9. The Holzers soon recognized that ingredients with a high percentage of insoluble dietary fiber could be ideal components of such food products, as they have very few calories but also promote satiety. Unfortunately, the archetypical dietary fiber – cellulose – is not considered highly acceptable -- its characteristics are similar to wood, or sawdust when finely milled. Foods containing a significant fraction of cellulose (greater than roughly 10% on a dry weight basis) tend

to have unpleasant flavor or texture, often resulting in a coarse and dry texture, dark and uneven appearance, and earthy flavors which many consumers do not prefer.

10. The Holzers; therefore, focused on non-traditional high-fiber ingredients, such as polyols, oligosaccharides, gums, soluble fibers, and resistant starches. They adapted standard recipes for a variety of foods by attempting to replace a significant fraction of the flour component with one or more high fiber ingredients. After extensive experimentation, the Holzers found that as a higher percentage of flour was replaced, most of these high fiber ingredients began to cause unacceptable taste and texture imperfections in the food products. In some cases, it was difficult or impossible to produce a coherent finished product. Some ingredients also caused gastric and digestion issues when consumed in high levels. Ultimately, the Holzers concluded that flavorful food with acceptable texture and appearance, while also achieving significant calorie reductions and digestive tolerance, could be produced by using high levels of resistant starch type 4, and, to a lesser extent, resistant starch type 2.

PATENT INFRINGEMENT

11. On June 6, 2017, the United States Patent and Trademark Office (“PTO”) issued the ‘488 Patent to the Holzers, entitled “Calorie Reduction-Taste Retention Food Products” after a full and fair examination. The PTO issued a Certificate of Correction on August 15, 2017. On December 31, 2010, David Holzer assigned all rights in the ‘488 Patent to Healthy Fiber.¹ The ‘488 Patent relates generally to food formulations and particularly the reduction of calories without concomitant loss of mouth feel, flavor and texture. Healthy Fiber has the right to enforce the ‘488 Patent and to recover all damages available under law.

¹ Earlier, in 2006, Aryeh Holzer had assigned his rights in the inventions to David Holzer.

12. The '488 Patent contains a total of six claims, one independent and five dependent claims. Claim 1 states:

A starch-based flour food product comprised primarily of a starch-based flour and selected from a group consisting of baked goods, breads, cakes, cereals, pasta, and pastries having been prepared at a temperature of at least 100° C, to a final food product and having in the range of 1 to 3.25 calories per gram, on a dry weight basis, the starch-based flour comprising a sufficient amount of type IV resistant starch wherein the total dietary fiber within the final food product arising from the type IV resistant starch comprises 14-60% of the final food product by weight, on a dry weight basis, after the temperature preparation of at least 100° C.

In addition, dependent claim 2 claims:

The food product of claim 1 wherein the food product is selected from the group consisting of cookies, cakes, crisps, instant noodles, crackers, cheese crackers, pasta, muffins, brownies, breakfast cereals, pizza crust, bread, doughnuts, biscuits, pie, wafers and egg noodles.

Further, dependent claim 4 claims:

The food product of claim 1 with the final food product having in the range of 1 to 2.66 calories per gram on a dry weight basis.

Infringement of the '488 Patent

13. Kroger sale, and/or offers for sell to customers within the United States a number of low-calorie, high-fiber products that infringe the '488 Patent. Included among the infringing products sold by Kroger are the "Carb Balance" line of tortillas manufactured by Mission Foods ("Accused Tortilla Products").² Kroger also sells a line of private labeled pasta products that include Kroger Reduced Calorie Thin Spaghetti and Kroger Reduced Calorie Penne Rigate Pasta ("Accused Pasta Products") (the Accused Tortilla Products and the Accused Pasta Products are collectively referred to herein as "Accused Products").

² The "Carb Balance" line of tortillas include the "Mission Fajita Carb Balance Whole Wheat Tortilla," "Mission Fajita Carb Balance Tortilla," "Mission Soft Taco Life Balance Whole Wheat Tortilla," "Mission Soft Taco Carb Balance Tortilla," and "Mission Carb Balance Whole Wheat Soft Taco Tortilla."

14. The Accused Products are starch-based flour food products that are prepared at a temperature of at least 100° C. The Accused Tortilla Products have approximately 2.5 calories per gram, when measured on a dry weight basis and in accordance with Food and Drug Administration guidelines. Further, the Accused Tortilla Products comprise a sufficient amount of type IV resistant starch such that the total dietary fiber in these products is approximately 45% of the final food product (again, when measured on a dry weight basis).

15. Similarly, the Accused Pasta Products have approximately 2.5 calories per gram when measured on a dry weight basis and in accordance with Food and Drug Administration guidelines. The Accused Pasta Products also comprise a sufficient amount of type IV resistant starch such that the total dietary fiber in these products is approximately more than 25% of the final food product (again, when measured on a dry weight basis).

Kroger has Knowledge of the Inventions Claimed in the ‘488 Patent

16. Healthy Fiber has a sister company, known as Fiber Gourmet, that manufactures and sells a variety of low calorie, high-fiber products, including pastas, cookies, and crackers. In August of 2007, Fiber Gourmet gave Kroger a presentation promoting its reduced calorie pasta line and offering to manufacture those products for Kroger as “private label” products. Alternatively, Fiber Gourmet offered to license to Kroger the technology embodied in the ‘488 Patent. Later, in May of 2008, Fiber Gourmet corresponded with Jennifer Siewe, Procurement Manager, and Paul Seiwert, Corporate Food Technologist for Kroger and provided Kroger with samples of its Light Pasta. Rather than take advantage of the business opportunity offered by Fiber Gourmet, Kroger chose instead to obtain its Accused Pasta Products from another pasta manufacturer.

COUNT ONE: INFRINGEMENT OF '488 PATENT

17. Healthy Fiber realleges paragraphs 1 through 17 herein.

18. Kroger has been and is now directly infringing, either literally or through the doctrine of equivalents, at least Claims 1, 2 and/or 4 of the '488 patent by selling and/or offering for sale the Accused Products.

19. In addition, by selling and/or offering to sell the Accused Products that include instructions for customers as to the use of these products, such that those customers would directly infringe one or more of the claims of the '488 Patent, Kroger has actively, intentionally, and/or knowingly induced or contributed to the infringement of one or more of claims 1, 2 and/or 4 of the '488 Patent, either directly or through the doctrine of equivalents. For example, on the package of its Reduced Calorie Thin Spaghetti, Kroger instructs consumers to prepare a final food product by cooking the pasta in boiling water.³

20. The Accused Products have no substantial uses that do not infringe the '488 Patent.

21. Kroger has had knowledge of the '488 Patent at least since being served with a copy of this Complaint.

MISCELLANEOUS

22. Healthy Fiber has satisfied all conditions precedent to filing this action, or any such conditions that have not been satisfied have been waived.

23. Through this pleading, Healthy Fiber has not elected any one remedy to which it may be entitled, separately or collectively, over any other remedy.

³ The temperature for water to boil is 100° C.

RELIEF

Plaintiff Healthy Fiber respectfully requests the following relief:

- A. That the Court award damages to Plaintiff Healthy Fiber;
- B. That the Court award enhanced damages to Plaintiff Healthy Fiber as a result of Kroger's willful infringement of the '488 Patent;
- C. That the Court declare this to be an "exceptional" case under 35 U.S.C. § 285;
- D. That the Court award pre-judgment and post-judgment interest on such damages at the highest rates allowed by law;
- E. That the Court award Plaintiff Healthy Fiber its costs and attorneys' fees incurred in this action; and
- F. That the Court award such other and further relief, at law or in equity, as the Court deems just and proper.

A JURY TRIAL IS DEMANDED BY PLAINTIFF HEALTHY FIBER, LLC.

Respectfully submitted,

By: /s/ Steven N. Williams

Steven N. Williams

swilliams@mcdolewilliams.com

TX State Bar No. 21577625

William Zac Duffy

zduffy@mcdolewilliams.com

TX State Bar No. 24059697

Winston O. Huff

whuff@mcdolewilliams.com

TX State Bar No. 24068745

MCDOLE WILLIAMS

A PROFESSIONAL CORPORATION

1700 Pacific Avenue, Suite 2750

Dallas, Texas 75201

(214) 979-1122 - Telephone

(214) 979-1123 – Facsimile

ATTORNEYS FOR PLAINTIFF HEALTHY
FIBER, LLC